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Title IX and Sexual Violence on College Campuses: The Need for Uniform On-Campus Reporting, Investigation, and Disciplinary Procedures

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**TITLE IX AND SEXUAL VIOLENCE ON COLLEGE CAMPUSES:
THE NEED FOR UNIFORM ON-CAMPUS REPORTING,
INVESTIGATION, AND DISCIPLINARY PROCEDURES**

“At issue is not the Title IX statute itself, which simply outlaws discrimination in educational institutions on the basis of gender. The problem is the way in which Title IX has been applied.”¹

I. INTRODUCTION

Emma Sulkowicz, a Columbia University graduate, brought a mattress with her to her graduation ceremony this past May.² This stems from her claim that she was raped by a fellow student, and the messy investigation that followed.³ The case has gained significant media attention, and the school was highly criticized for their investigation and disciplinary procedures relating to rape and sexual assault allegations.⁴ While the male student was acquitted by the school, both parties involved criticized the school for the way Columbia handled the incident, including the lack of investigation, not allowing certain evidence in during the school trial, and the crude and insensitive way Emma was asked to speak about the rape.⁵ This caused Emma to begin carrying a mattress around campus, and ultimately to graduation, to help bring awareness about rape on college campuses.⁶ While this horrible incident at Columbia is shocking, it is nothing new. It is bad enough to hear about the large amounts of sexual assault that take place on college campuses each year, but it is even worst knowing that universities are handling these situations improperly.⁷

1. ALLISON KASIC & KIMBERLY SCHULD, *TITLE IX AND ATHLETICS: A PRIMER* 1 (2008).

2. Emily Bazelon, *Have We Learned Anything from the Columbia Rape Case?*, N.Y. TIMES MAGAZINE (May 29, 2015), <http://www.nytimes.com/2015/05/29/magazine/have-we-learned-any-thing-from-the-columbia-rape-case.html>.

3. Bazelon, *supra* note 3.

4. *See* Bazelon, *supra* note 3.

5. Bazelon, *supra* note 3.

6. Bazelon, *supra* note 3.

7. *See* Samantha Tomilowitz & Jeong Park, *UCLA Under Investigation for Possible Title IX Violations*, DAILY BRUIN (August 13, 2014, 1:09 PM), <http://dailybruin.com/2014/08/13/ucla-under-investigation-for-possible-title-ix-violations>; *see also* Natalie Coleman, *Universities Across Nation Under Investigation for Sexual Assault Response*, THE NEWS RECORDS (March 3, 2014 11:38 PM), http://www.newsrecord.org/news/sexual_assault_spotlight/universities-across-nation-under-investigation-for-sexual-assault-response/article_3a30dc08-a2f1-11e3-9183-001a4bcf6878.html.

Title IX is the federal law that governs discrimination on the basis of sex at federally funded educational institutions.⁸ Most people mistakenly assume that Title IX only applies to athletics.⁹ However, Title IX actually requires gender equity in federally funded educational programs, and includes sexual harassment, education for pregnant and parenting students, sports, and numerous other areas.¹⁰ While Title IX was passed over thirty-five years ago there are still several questions on how the law actually operates and what it means for the federally funded educational programs that must abide by it.¹¹

The most recent issues regarding Title IX involve the large amount of Title IX violations occurring at universities nationwide.¹² The problem has gotten too big to ignore, with numerous news articles and lawsuits filed against universities for not following the Title IX criteria¹³, causing the Department of Education to release a list of over fifty universities under investigation for violations of Title IX due to their handling of sexual violence and harassment claims.¹⁴ This has also caused the Obama administration to crack down on the Title IX violations taking place at college campuses.¹⁵ In April of 2014 the White House Task Force to Protect Students Against Sexual Assault released a twenty page report titled “Not Alone” which included strongly worded statements from President Obama and Vice President Biden on the epidemic of sexual violence taking place on college campuses.¹⁶

Despite the increasing concerns about sexual victimization of higher education students little information has been published about how higher education institutions handle these types of allegations.¹⁷ The information that can be found is scattered at best, with little consistency about how universities handle claims of sexual violence. Some critics blame these inconsistencies on the way Title IX has been interpreted by the Office of Civil Rights (OCR), claiming that they only provide vague guidelines for deciding whether an

8. HISTORY OF TITLE IX, <http://www.titleix.info/History/History-Overview.aspx> (last visited November 15, 2014) (hereinafter, HISTORY OF TITLE IX).

9. HISTORY OF TITLE IX, *supra* note 9.

10. HISTORY OF TITLE IX, *supra* note 9.

11. HISTORY OF TITLE IX, *supra* note 9.

12. HEATHER M. KARJANE, ET AL., CAMPUS SEXUAL ASSAULT: HOW AMERICA’S INSTITUTIONS OF HIGHER EDUCATION RESPOND, NAT’L CRIMINAL JUSTICE REFERENCE SERV. 4 (2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>.

13. KARJANE, *supra* note 13, at vi.

14. U.S. DEP’T OF EDUC., *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, May 1, 2014, <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i> [hereinafter *List of Institutions with Open Title IX Investigations*].

15. Jay Caspian King, *Ending College Sexual Assault*, HARPER’S MAGAZINE (Sept. 9, 2014, 4:32 PM), <http://harpers.org/blog/2014/09/ending-college-sexual-assault/>.

16. King, *supra* note 16.

17. Karjane et al., *supra* note 13, at vi.

institution's grievance procedures are acceptable.¹⁸ This vagueness leaves universities with a large amount of room to make their own procedural decisions causing policies on sexual violence to vary from school to school.¹⁹ These ambiguities include things such as how to file a complaint, how long universities have to investigate the complaint, what punishment is appropriate if the complaint is substantiated, and several other grey areas that have not been fully addressed by the OCR.²⁰

Others argue that the stringent burden placed on the private litigant by the Supreme Court has made it nearly impossible for schools to be found guilty of a Title IX violation, which gives schools less incentive to have specific guidelines and procedures in place.²¹ The Supreme Court held in the landmark case of *Davis v. Monroe County Board of Education* that schools could be held liable under Title IX for student on student sexual harassment but only if the plaintiff can prove the school was "deliberately indifferent to know acts of sexual harassment."²² The school must also have authority over the harasser and over the environment in which the harassment took place to be held liable.²³ This seminal case played a large role in the way Title IX is interpreted and applied today.

The National Institute of Justice statistical findings show that twenty to twenty-five percent of women will be a victim of sexual violence during their college career.²⁴ Among the total sample, five percent experienced a completed physically forced sexual assault and eleven percent experienced a completed incapacitated sexual assault.²⁵ In fact, studies show that college women are at greater risk of rape and other forms of sexual assault than the general population.²⁶ These alarming statistics are cause for concern due to the sexual victimization of female college students.²⁷ A solution to the problem of how higher education institutions should handle claims of sexual violence is dire due to the large amount of assaults that happen on college campuses each year, along with the high amount of Title IX violation claims that are filed.²⁸

18. Grayson S. Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 99 (2010).

19. Walker, *supra* note 19, at 99.

20. Karjane et al., *supra* note 13, at 21.

21. Karjane et al., *supra* note 13, at 100.

22. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999).

23. *Id.* at 645.

24. C.P. Krebs et. al., *The Campus Sexual Assault (CSA) Study*, NAT'L CRIMINAL JUSTICE REFERENCE SERV. 2-1 (December 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

25. Krebs et. al., *supra* note 25, at xiii, 6-1.

26. Bonnie Fisher et al., *The Sexual Victimization of College Women*, NAT'L CRIMINAL JUSTICE REFERENCE SERV. 1 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

27. Fisher et al., *supra* note 27, at 1.

28. *See* Krebs et al., *supra* note 25, at 6-4.

The fact that there are no consistent procedures in place by most universities coupled with the lack of relief offered by courts in their interpretation of Title IX makes students less likely to report sexual assault when it does occur.²⁹ In fact, statistics show that less than five percent of rapes on college campuses are reported.³⁰ Along these same lines, the Office of Civil Rights encourages schools to allow victims to decide whether or not they will go to the police or want the issue handled internally by the school.³¹ This police optional approach has grave consequences because many of the campus sex crimes handled internally by the university are not subjected to professional forensic investigations, which makes it more likely for perpetrators to go unpunished and reoffend.³² Hearing sexual misconduct complaints requires trained adjudicators, sophisticated knowledge of the law, and rules of evidence, and most universities just do not have these resources.³³ The inability for universities to adequately handle claims of sexual violence is just one of many reasons there is significant underreporting of sexual violence when it does occur on campus.³⁴

The procedural inconsistencies of universities, the stringent tests set forth by courts, and the inability of universities to investigate and adjudicate claims of sexual violence has caused the people Title IX is meant to protect to feel that they have no recourse when they are sexually assaulted.³⁵ Although sexual assault on college campuses has become a hot topic over the recent years, and some improvements have been made, such as Congress passing the Student Right to Know and Campus Security Act of 1990,³⁶ there is still a lot of reform that is needed to ensure that sexual violence on college campuses is drastically reduced, and that when it does occur that it is handled efficiently.

This article argues that the interpretation of Title IX of the Education Amendments of 1972 is ambiguous and has left universities with too much breathing room in determining how they handle claims of sexual violence. This

29. See Krebs et al., *supra* note 25, at 6–4.

30. Krebs et al., *supra* note 25, at 2–9.

31. U.S. DEPT. OF EDUC., QUESTIONS & ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014).

32. Robert Shibley, *Time to Call the Cops: Title IX has Failed Campus Sexual Assault*, TIME (Dec. 1, 2014), <http://time.com/3612667/campus-sexual-assault-uva-rape-title-ix/>.

33. BRETT SOKOLOW, COMPREHENSIVE SEXUAL MISCONDUCT JUDICIAL PROCEDURES 5 (Nat'l Ctr. for Higher Educ. Risk Mgmt., 2001), https://www.nchem.org/pdfs/COMPREHENSIVE_CAMPUS_SEXUAL_MISCONDUCT_JUDICIAL_PROCEDURES.pdf.

34. SOKOLOW, *supra* note 34, at 3.

35. Walker, *supra* note 19, at 99–100.

36. Student Right-to-Know Act, Pub. L. No. 101-542, § 204, 104 Stat. 2381, 2385 (1990) (mandating that colleges and universities participating in Federal student aid programs “prepare, publish, and distribute, through appropriate publications or mailings, to all current students and employees, and to any applicant for enrollment or employment upon request, an annual security report” containing campus security policies and campus crime statistics for that institution).

has caused numerous sexual assault claims to be mishandled which has led to lawsuits, injustice for the victims, and a lack of faith in higher education. The police optional approach has only furthered these problems due to the fact that most universities are just not equipped with the legal training needed to handle these complex complaints. In order to fully examine the topic, this article will first discuss the history of Title IX and its interpretation by courts. Next, the article will address the procedural issues that arise in sexual violence claims and the broad and ambiguous instructions provided by the OCR. Finally, the article will analyze the problems that arise out of the police optional approach that has been promoted by the Office of Civil Rights

II. THE HISTORY OF TITLE IX

Title IX is a thirty-seven-word bill that passed in 1972 with little controversy.³⁷ The catalyst of the legislation stemmed from the widespread discrimination women faced in all aspects of the educational experience and was passed because the Civil Rights Act of 1964 banned discrimination based on sex in employment, but did not apply to educational institutions.³⁸ Implementation of the law was a slow process and it wasn't until 1975 that the Department of Health, Education, and Welfare finished drafting the regulations discussing which areas of law Title IX covered.³⁹ Colleges and universities then received a three-year grace period to review their current programs and make changes to correct any areas that were inconsistent with the new law.⁴⁰ While Title IX is now most commonly correlated with athletics, the actual impetus behind the legislation was the more broad issue of sex discrimination in higher education.⁴¹

Title IX has a turbulent history within the court system and to full understand how the law has evolved to include claims against sexual violence the lineage of court cases addressing the matter must be discussed. A 1972 Supreme Court case was the first time that a private right of action under Title IX was recognized⁴² In *Cannon*, the petitioner claimed she was denied entry into medical school because of her gender and that Congress intended for a private right of action to be implied from Title IX.⁴³ The court used Title VII

37. SUSAN WARE, *TITLE IX: A BRIEF HISTORY WITH DOCUMENTS 3* (Bedford/St. Martin's, 2007).

38. WARE, *supra* note 38, at 3 ("Title IX. . . reads in full: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.").

39. WARE, *supra* note 38, at 4.

40. WARE, *supra* note 38, at 4.

41. WARE, *supra* note 38, at 35.

42. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 729 (1979).

43. *Id.* at 680.

as a guideline in their decision, saying that Title IX was similar in the way that both laws legislative histories and critical language support a private right of action.⁴⁴ This case was decided the same year that Title IX was passed and was the first step in interpreting the law.⁴⁵ However, there was then a major stall in cases heard by the Supreme Court regarding Title IX, and it was not until 1992 that the Supreme Court again heard a case that drastically impacted the way Title IX was interpreted.⁴⁶

Although the Supreme Court did not issue a judgment on a case that majorly affected Title IX for some years, there were waves being made in lower courts. For Example, *Alexander v. Yale* was the first case that upheld charges of sexual harassment under Title IX.⁴⁷ There, five female students claimed that they were sexually harassed by male faculty members and Yale failed to take these accusations seriously and was therefore in violation of Title IX.⁴⁸ The plaintiffs were not seeking damages from Yale, but wanted the university to set up a grievance process for students who had been sexually harassed.⁴⁹ While the plaintiffs did not win their case, the court did hold for the first time that sexual harassment constituted discrimination under Title IX.⁵⁰ The court ruled in *Alexander* that the relief sought had already been remedied but did not mention the possibility of plaintiffs being awarded monetary damages.⁵¹

It was not until Franklin, in 1992, that a court ruled monetary damages could be awarded in Title IX cases.⁵² Franklin was a sexual harassment case involving a high school sophomore who sued for money damages claiming a

44. *Id.* at 704–06.

45. Valerie M. Bonnette, *Title IX Basics*, 2 GOOD SPORTS, INC., TITLE IX AND GENDER. EQUITY SPECIALISTS 1 (2000), http://www.ncaa.org/library/general/achieving_gender_equity/title_ix_basics.pdf. To establish a prima facie cause of action under Title IX a plaintiff must prove that: 1. The school received federal funding; 2. The plaintiff was subject to discrimination; and 3. The discrimination was on the basis of sex. 28 U.S.C. § 1681(a) (2000).

46. *Franklin v. Gwinnett Cnty. Sch.*, 503 U.S. 60, 60 (1992).

47. *See Alexander v. Yale Univ.*, 631 F.2d 178, 180 (2d Cir. 1980).

48. *Id.*

49. *Id.* at 181; Nora Caplan Bricker, *How Title IX became Our Best Tool Against Sexual Harassment*, NEW REPUBLIC (June 22, 2012), <http://www.newrepublic.com/article/104237/how-title-ix-became-our-best-tool-against-sexual-harassment> (stating that the argument in *Alexander v. Yale* was the brainchild of Catherine MacKinnon, a Yale Law School graduate, who was in the process of writing a book titled *Sexual Harassment of Working Women*. She helped the plaintiffs in this case come up with the complaint to show that Yale was interfering with female students success by ignoring male professors offering better grades for sexual favors).

50. *See Alexander*, 631 F.2d at 184–185 (dismissing the case because Yale adopted procedures to hear sexual harassment complaints prior to trial; therefore, there was no longer a remedy available because the major relief that was being sought had already been granted).

51. *Id.*

52. *Franklin*, 503 U.S. at 60.

teacher sexually harassed and abused her and that the school was made aware of the situation and did nothing to stop it.⁵³ The court followed the traditional presumption that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.⁵⁴ The case was remanded to allow for monetary damages, but the case was settled before it went back to trial, and therefore no clear test was laid out for what was necessary for monetary damages to be awarded.

While cases such as *Alexander* and *Franklin* greatly impacted the ability of individuals to seek monetary damages in sexual harassment claims under Title IX, it was not until a 1998 Supreme Court case that a clear standard emerged to determine whether a school would be held liable for sexual harassment.⁵⁵ In *Gebser*, a high school teacher engaged in sexual relations with one of his students and did not stop until they were caught having sex by a police officer.⁵⁶ The student did not report the relationship to school officials claiming that while she realized the conduct was improper she did not want to lose him as a teacher.⁵⁷ The school did not, at the time, have a formal anti-harassment policy or a grievance procedure, both which were mandated by federal law.⁵⁸ The student's mother then filed suit claiming the school had violated Title IX, and sought monetary relief.⁵⁹ The court held that for a school to be held liable for sexual harassment under Title IX, at a minimum an official with authority to address the harassment and implement corrective measures, must have actual knowledge about the harassment, and fail to respond to it.⁶⁰ The court also held that it was not enough for the official to have actual knowledge about the harassment but that the officials' failure to respond must amount to "deliberate indifference."⁶¹ The deliberate indifference standard created a high hurdle for plaintiffs in regards to sexual harassment claims under Title IX.

53. *Id.* at 63. This is the first time that a form of sexual assault is mentioned in a Title IX claim; plaintiff claimed the defendant forced her to kiss him. *Id.* However, the plaintiff's claim also involved inappropriate conversations, and the court did not make a distinction between the claims. *Id.* It was not until 2011 that the Department of Education clarified that rape and other forms of sexual violence were considered sexual harassment in regards to being covered by Title IX. QUESTIONS & ANSWERS, *supra* note 32.

54. *Franklin*, 503 U.S. at 73–74.

55. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 274 (1998).

56. *Id.*

57. *Id.* at 278.

58. *Id.*

59. *Id.* at 278–79.

60. *Id.* at 290.

61. *Gebser*, 525 U.S. at 291.

The last Supreme Court case that truly expanded how sexual harassment claims under Title IX are handled was the seminal 1999 case of *Davis v. Monroe County*.⁶² Here, a fifth grade girl claimed that a male student constantly harassed her by making vulgar remarks, and trying to touch her breasts and genitals.⁶³ Unlike *Gebser*, where the school officials were not made aware of the harassment, here, the plaintiff claims that the school board was made aware of the incidents and did not take any action, and that the harassment continued.⁶⁴ The main issue in front of the court was whether or not student on student sexual harassment was covered under Title IX.⁶⁵ The court held that student on student sexual harassment was covered by Title IX and that to have a cause of action the school must have control over the victim, the harasser, and the location that the harassment took place.⁶⁶ Additionally, the court held that the “deliberate indifference” standard applied, and the court also added an additional level of scrutiny, holding that sexual harassment qualifies as discrimination under Title IX when “it is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”⁶⁷ The Court noted, “that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.”⁶⁸ “According to the majority, school officials must “merely respond to known peer harassment in a manner that is not clearly unreasonable.”⁶⁹

While *Davis* did expand Title IX claims to allow for monetary relief in student on student sexual harassment claims, it also added additional burdens on the plaintiff to win these claims, due to the high standard of the “deliberate indifference” test.⁷⁰ As long as the school’s approach to the issue of sexual harassment is made with reason and caution, and the problem has been addressed in some way, the school is likely to be protected from Title IX liability.⁷¹ The Supreme Court has addressed Title IX sexual harassment claims

62. See *Davis Next Friend Lashonda D. v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 629 (1999).

63. *Id.* at 633.

64. *Id.* at 635.

65. See *id.* Until *Davis*, all cases heard in front of the courts involved teacher on student sexual harassment claims.

66. *Id.* at 645.

67. *Id.* at 633.

68. *Davis*, 526 U.S. at 648.

69. *Id.* at 649.

70. *Id.*

71. *Id.*

since *Davis*.⁷² However, the stringent test set forth in *Davis* is still used today to determine whether or not a plaintiff will be awarded monetary damages for a sexual harassment claim under Title IX.

While an understanding of the case law involving Title IX is important, it is also necessary to understand how the term sexual harassment has been defined and interpreted in regards to Title IX, as well as the history of sexual violence being included under the sexual harassment umbrella. The Office of Civil Rights defines sexual harassment as “unwelcome conduct of a sexual nature” and state that it can include verbal, non-verbal, or physical conduct.⁷³ This is a rather vague definition and there has been a call from legal scholars for the OCR to give a more concrete meaning to the term.⁷⁴ However, the OCR stated that they were not going to give specific labels for types of sexual harassment and that, “whether the harassment rises to a level that it denies or limits a student’s ability to participate in or benefit from the school’s program based on sex,” is what determines if sexual harassment, in the context of Title IX, has occurred.⁷⁵

While distinct types of sexual harassment are no longer used by the OCR, until the 2001 Revisions to the OCR Title IX Guidebook, sexual harassment was usually divided into two different types: quid pro quo harassment and hostile environment harassment.⁷⁶ Quid pro quo harassment occurs if a teacher or other employee conditions an educational decision or benefit on the student’s submission to unwelcome sexual conduct, and hostile environment harassment occurs when there is any kind of sexual harassment that is not conditioned on an educational decision or benefit.⁷⁷ The OCR’s reluctance to really define sexual harassment in a meaningful way has left the door open for courts to decide whether or not the term should be defined narrowly or broadly.

One major problem that came from the lack of a clear definition was the question of whether or not rape and other forms of sexual violence were considered sexual harassment under the purview of Title IX. The 2011 Office of Civil Rights Dear Colleague Letter was the first time that the Office of Civil Rights defined sexual harassment as including rape and other forms of sexual violence.⁷⁸ The 2001 Guidebook does not mention sexual violence or rape but

72. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005) (holding that schools are prohibited under Title IX from retaliating against those who protest sex discrimination).

73. U.S. DEPT. OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE (2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

74. *Id.* at v.

75. *Id.* at 5.

76. *Id.* at iv–v.

77. *Id.* at 5.

78. RUSSLYNN ALI, U.S. DEPT. OF EDUC., DEAR COLLEAGUE 1–2 (April 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

exclusively mentions sexual harassment.⁷⁹ While the Guidebook says that sexual harassment can be physical conduct of a sexual nature it does not define what physical conduct is.

There are also a large amount of legal scholars that have consistently used the words sexual harassment and sexual violence interchangeably even though, until 2011, there was no clear consensus on whether or not rape and other forms of sexual violence were in fact covered by Title IX.⁸⁰ However, other scholars saw the danger of rape not directly being included in the sexual harassment umbrella and called for Congress to amend Title IX to include rape as sexual harassment, and therefore be considered sexual discrimination.⁸¹ Traditionally, sexual harassment has been defined as more of an abuse of power, while sexual assault is more related to force.⁸² Due to the lack of consistency among scholars, and the fact that sexual harassment had not yet been defined as including rape and other forms of sexual violence, courts were tasked with the decision of whether or not rape would be considered sexual harassment.⁸³ While there is an assumption that rape would constitute sexual harassment under Title IX because of how courts handled the same question in regards to Title VII,⁸⁴ until the 2011 Dear Colleague Letter, the issue had never been fully addressed.

The Dear Colleague Letter stated that sexual harassment of students included sexual violence and defined sexual violence stating, “A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.”⁸⁵ The letter also outlines the responsibilities and requirements that schools must carry out in relation to claims of sexual harassment.⁸⁶ The letter, which instituted major changes in the way sexual harassment is defined and the requirements of schools to handle sexual harassment, is a change that many have sought for years.⁸⁷ One of the main reasons that sexual harassment, as it is related to Title

79. See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 74.

80. See Michele Paludi & Richard Barickman, *Proposed Title IX guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271, 277–78 (1994); CAROL BOHMER & ANDREA PARROT, *SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION* 4 (1993).

81. Terry Nicole Steinberg, *Rape on College Campuses: Reform through Title IX*, 18 J.C. & U.L. 39, 52 (1991).

82. BOHMER & PARROT, *supra* note 81, at 4.

83. See BOHMER & PARROT, *supra* note 81, at 4.

84. BOHMER & PARROT, *supra* note 81, at 4; see ALI, *supra* note 79.

85. ALI, *supra* note 79, at 1–2.

86. ALI, *supra* note 79, at 3.

87. Allie Grasgreen, *OCR Dear Colleague Letter Prompts Big Change in Sexual Assault Hearings at UNC*, INSIDE HIGHER ED (April 24, 2012, 3:00 AM), <https://www.insidehighered.com/news/2012/04/24/ocr-dear-colleague-letter-prompts-big-change-sexual-assault-hearings-unc>.

IX, is now being revisited after years of ambiguous language and unknowns is due to the large amount of publicity the topic has received over the past few years.⁸⁸ This publicity comes in the wake of the large amount of settlements the Department of Education has had to handle due to the Obama administration cracking down on these types of Title IX violations.⁸⁹

III. THE PROCEDURAL ASPECTS OF SEXUAL VIOLENCE CLAIMS AT UNIVERSITIES

A discussion of the general history of Title IX is necessary to show some of the issues that have arisen due to the ambiguity of the bill and how it has been interpreted. However, a deeper look at how these issues have trickled down to cause major inconsistencies in the way universities handle the procedural aspects of these sexual harassment claims is needed to show just how truly ambiguous the Office of Civil Rights has been in the guidelines they set out for institutions to comply with Title IX.

The 2011 Dear Colleague Letter was the first indication that there was a major problem with how higher education institutions were handling sexual harassment claims. The letter came after decades of inconsistencies and ambiguities as to what was actually covered under Title IX and a seemingly non-existent response to sexual violence claims by university administrations. The letter tasked universities with three main steps that they must follow in order to continue to receive federal funding.⁹⁰ These steps include distributing a notice of nondiscrimination to all members of the educational community, appointing a Title IX officer to oversee compliance and complaints, and adopting and publishing Title IX grievance procedures.⁹¹ The letter discussed forty-two different types of sexual behavior that universities are responsible for addressing under Title IX, in the hopes that a large amount of misconduct going on at universities would be eliminated and could be preventable in the future.⁹² While there were high aspirations that the letter would bring about

88. See ALI, *supra* note 79. The OCR did not release any guidelines or information on Title IX compliance after the 2001 DCL, until 2011. See ALI, *supra* note 79.

89. See KANG, *supra* note 16.

90. Lisa Karen Atkins, *The Basic of Complying with the "Dear Colleague Letter" Issued by the U.S. Department of Education on April 4, 2011*, OGLETREE DEAKINS (July 25, 2014), <http://www.ogletreedeakins.com/Shared%20Content/Content/Articles/Publications/Articles/The%20Basics%20of%20Complying%20With%20the%20Dear%20Colleague%20Letter%20Issued%20by%20the%20US%20Department%20of%20Education%20on%20April%204%20201120130725>.

91. Atkins, *supra* note 91.

92. See ALI, *supra* note 79.

sweeping change it actually seemed to cause even more confusion as to what was actually required from universities.⁹³

The Office of Civil Rights was flooded with a large amount of requests for technical assistance because universities did not understand what precisely the 2011 Dear Colleague Letter required of them.⁹⁴ Universities had not been faced with any procedures for how to be in compliance with Title IX since the 2001 guidebook was released. This prompted the Office of Civil Rights to release a guide in 2014 to help universities gain a better understanding of their legal obligations set for in the Dear Colleague Letter.⁹⁵ The next day the Office of Civil Rights also released a list of fifty-five universities with open investigations for not following the Title IX sexual violence policies the Office of Civil Rights had laid out in the 2011 Dear Colleague Letter.⁹⁶

While the guide was meant to clarify the responsibilities of the universities, it did not offer any clarification on the three requirements that the Dear Colleague Letter initially laid out and much of the language in the guide was very broad and ambiguous. In fact, their explanation of the elements that a Title IX investigation should include offers no guidance and is so broad that if followed could mean that every school had a different investigation and adjudication policy.⁹⁷ Since then, colleges have been scrambling to comply with the latest Office of Civil Rights Guide to avoid becoming subject to investigation.⁹⁸ This approach leaves colleges vulnerable to claims of negligence and mistreatment by the accused, whose rights are barely recognized by the Office of Civil Rights.⁹⁹ Moreover, the Office of Civil Rights guidance does not provide answers to the endless questions that arise in sexual violence cases and is not consistent with other recent federal regulations.¹⁰⁰

The only other information that is provided on how the grievance process should be handle is that it should be “prompt and equitable,” yet no clarification is made as to what qualifies as a “prompt and equitable” grievance

93. Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY L. REV. 49, 53, 60 (2013).

94. QUESTIONS & ANSWERS, *supra* note 32, at ii.

95. See generally QUESTIONS & ANSWERS, *supra* note 32 (attempting to provide guidance to help colleges comply with their Title IX obligations through a 45-page guidance document).

96. *List of Institutions with Open Title IX Investigations*, *supra* note 15.

97. QUESTIONS & ANSWERS, *supra* note 32, at 24 (“The specific steps in a school’s Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local requirements, and what it has learned from past experiences”).

98. Ariel Sullivan, *Illegal Procedure: Title IX and Sexual Assault*, NEW ENG. J. OF HIGHER EDUC. (Jan. 16, 2015), <http://www.nebhe.org/thejournal/illegal-procedure-title-ix-and-sexual-assault/>.

99. Sullivan, *supra* note 99.

100. Sullivan, *supra* note 99.

process.¹⁰¹ The Office of Civil Rights also has full discretion to make decisions as to what is considered “prompt and equitable” on a case-by-case basis.¹⁰² There are also contradictions between various Office of Civil Rights documents as to what is actually required by schools in regards to sexual harassment.¹⁰³ These contradictions could be caused by the inconsistencies between the various offices themselves and that fact that these offices do not follow a uniform system of information classification and retrieval, making it nearly possible to get accurate information.¹⁰⁴ If there is no uniformity or consistency in how the Office of Civil Rights handles things then how are thousands of higher education institutions expected to have any type of uniformity or consistency when they try to follow the guideline set out by the Office of Civil Rights?

The large amount of ambiguity coupled with the inconsistent nature of the Office of Civil Rights makes it nearly impossible to formulate any type of real policy or procedure for all the universities to follow. Therefore, it is left up to the universities to interpret what the Office of Civil Rights guidelines state and try to come up with a workable system to handle sexual violence claims. There are numerous steps that take place once a sexual harassment complaint has been filed which leaves room for inconsistencies at each step. A closer look at the actual procedures that institutions use when someone files a claim of sexual violence will shine light on how ambiguities and inconsistencies actually affect the way Title IX complaints are handled by universities.

A. *Notice of Sexual Violence*

The Office of Civil Rights guidelines do not require that a written complaint be filed for the university to be considered notified of sexual violence.¹⁰⁵ The test for notice is, “if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence.”¹⁰⁶ Notice can occur from students filing a formalized complaint, but can also be from a third party reporting the incident, social network sites, and the media.¹⁰⁷

This broad test can make it difficult for the university to know when they have been put on notice and can also make it difficult for the victim to prove that the university had notice, and did not respond, if they are suing for

101. Sullivan, *supra* note 99.

102. Henrick, *supra* note 94, at 68. In one instance the OCR held that a nine month delay between filing charges and a resolution met the “prompt” requirement. Henrick, *supra* note 94, at 68.

103. Henrick, *supra* note 94, at 66.

104. Henrick, *supra* note 94, at 66.

105. QUESTIONS & ANSWERS, *supra* note 32, at 2.

106. QUESTIONS & ANSWERS, *supra* note 32, at 2.

107. QUESTIONS & ANSWERS, *supra* note 32, at 2.

monetary damages against the university in regards to a Title IX claim. How would a victim prove that the university was notified if it was an instance other than a written complaint? Currently, six out of ten higher education institutions have a formalized written complaint process that they follow whenever a claim of sexual violence is made.¹⁰⁸ The office that the victim files the complaint varies drastically from school to school, including the Judicial Disciplinary Office, Student Affairs, Student Legal Counsel, Campus Police, Dean of Students, and the Office of Student Life.¹⁰⁹

There is also a lack of instructions on what procedures universities must take in order to put the accused on notice that a complaint has been filed, and much debate on proper procedures for keeping the complainant anonymous if that is requested.¹¹⁰ The place where students file reports of sexual violence and whether students know where they can go to file is important because these procedural issues can often inhibit the reporting of sexual violence.¹¹¹ The ambiguity in the notice requirement set out by the Office of Civil Rights can be seen in the lack of uniformity in how university's handle the complaint process and what office handles the complaint. The Office of Civil Rights needs to provide more descriptive instructions for how universities should handle these procedures in order to ensure that sexual violence is getting reported and that victims have the appropriate information to be able to file a complaint if sexual violence occurs.

B. Investigation

The Office of Civil Rights does not set out specific guidelines for how a Title IX investigation should proceed or who should conduct the investigation, and states that it will depend on the case at hand.¹¹² The only real criteria in regards to how these claims should be investigated is that the investigation must be adequate, reliable, impartial, prompt, and include the opportunity for both parties to present evidence and witnesses.¹¹³ Once again, this broad requirement regarding the obligation of universities to investigate sexual violence claims has opened the door for universities to decide what

108. Karjane et al., *supra* note 13, at 107 (using published sexual assault materials from 2,438 institutions). All nine types of schools eligible for Title IV funding are represented in the report: four-year public, four-year private non-profit, two to four year private for profit, two year public, two year private non-profit, less than two year public and private non-profit, less than two year private for profit, Native American tribal schools, and historically black colleges and universities. See Karjane et al., *supra* note 13, at vi.

109. Karjane et al., *supra* note 13, at 108.

110. QUESTIONS & ANSWERS, *supra* note 32, at 21.

111. Karjane et al., *supra* note 13, at 107.

112. QUESTIONS & ANSWERS, *supra* note 32, at 24.

113. QUESTIONS & ANSWERS, *supra* note 32, at 25.

investigative procedures they want to use and not follow any type of uniform procedure.¹¹⁴

Only twenty-five percent of universities have a uniform process to investigate claims of sexual violence.¹¹⁵ Within the percentage of universities with a uniform process, only twenty-five percent of those have protocols in place between the campus and local law enforcement for responding to claims of sexual violence.¹¹⁶ Protocols can help ensure the victim's confidentiality during the investigation, and are an important component of a sexual assault and reporting policy.¹¹⁷ These protocols help define the responsibilities so that investigations can be conducted promptly.¹¹⁸ However, while these protocols are important they are not required by the Office of Civil Rights to be in compliance with Title IX, which has resulted in a lack of protocols being implemented by universities.¹¹⁹ These statistics just further show the lack of requirements that the Office of Civil Rights actually has in regards to the investigative process.

After calling for action in the 2011 Dear Colleague Letter, the Office of Civil Rights has failed to provide clear guidelines to issues such as, what constitutes a prompt and effective response to a claim, how the grievance process should be conducted, who should conduct the investigation, and numerous other pertinent questions.¹²⁰ This has left colleges bearing more responsibility in deciding how to carry out their obligations under Title IX.¹²¹ It is pertinent that the Office of Civil Rights provides better guidelines to universities to help them meet their Title IX requirements, and if the Office of Civil Rights created a best practice manual to help guide them in responding immediately and appropriately to reports of student-on-student sexual violence then there would be more uniformity in how universities nationwide are responding to sexual violence claims.¹²²

C. Sanctions

The Office of Civil Rights only states that if the accused is found guilty of sexual violence that sanctions can be issued against them.¹²³ There is no guideline as to what sanctions are appropriate and the Office of Civil Rights

114. Walker, *supra* note 19, at 103–04.

115. Karjane et al., *supra* note 13, at 113.

116. Karjane et al., *supra* note 13, at 115.

117. Karjane et al., *supra* note 13, at 134.

118. Karjane et al., *supra* note 13, at 134.

119. See Karjane et al., *supra* note 13, at 115.

120. Walker, *supra* note 19, at 102–03.

121. Sullivan, *supra* note 99.

122. See Karjane et al., *supra* note 13, at 125 (providing a list of universities with fundamental and innovative practices in regards to their sexual violence policies).

123. See QUESTIONS & ANSWERS, *supra* note 32, at 34.

just states that sanctions are not enough and that remedies for the complainant and the student body must also be implemented.¹²⁴ There are no mandated sanctions to be in compliance with Title IX, regardless of the severity of the sexual violence. Therefore, accused student do not have to be suspended or expelled when found guilty in order for universities to be in compliance with Title IX.¹²⁵

Nine out of ten universities mention using some form of sanction as a disciplinary measure if the accused is found guilty of sexual violence.¹²⁶ The most common sanctions used at universities include expulsion, suspension, probation, censure, restitution, and loss of privileges.¹²⁷ While sanctions are more uniform amongst university the lack of requirements as far as what kind of sanctions should be issued makes it easier for universities to give out minimal sanctions for serious crimes such as rape and sexual assault. The thought of someone being found guilty of rape and only receiving academic probation as a sanction is outrageous and unfair to the victims. This has essentially decriminalized rape on college campuses.¹²⁸ There is a dire need for sanctions that are appropriate to the degree of sexual harassment or violence, and these sanctions need to be readily imposed and outlined by the Office of Civil Rights.¹²⁹

Notice, the investigation process, and sanctions are just a few of the procedural areas regarding sexual violence where there are still grey areas as to what is required under Title IX. The vague guidelines issued by the Office of Civil Rights do not promote uniformity as to the way universities should handle Title IX claims. While the 2011 Dear Colleague Letter is often noted to be the most important document in regards to Title IX, it did not provide a framework narrow enough to truly be applicable to universities. While it is important for universities to take their Title IX obligations seriously, they must also be able to fully comprehend what those responsibilities are, and the broad requirements issued by the Office of Civil Rights have not accomplished that goal. It is also up to the universities to make sure that the school officials in charge of sexual assault are capable of handling the competing interests that

124. QUESTIONS & ANSWERS, *supra* note 32, at 34.

125. Henrick, *supra* note 94, at 68 (stating that in one case the accused was found guilty of sexual assault and was only sentenced to probation and OCR held that this sanction was enough to be in compliance with Title IX).

126. Karjane et al., *supra* note 13, at 120.

127. Karjane et al., *supra* note 13, at 120.

128. See Danielle DeBold, *The Decriminalization of Rape on America's College Campuses*, 99 WOMEN LAW J. 10, 10 (2014) (discussing how Title IX interpretation has diminished the role criminal justice plays in combatting sexual violence).

129. RICHARD BARICKMAN, ET AL., FOREWORDS: AN ECOLOGICAL PERSPECTIVE TO UNDERSTANDING SEXUAL HARASSMENT OF MICHELE A. PALUDI, *IVORY POWER: SEXUAL HARASSMENT ON CAMPUS* xv (SUNY Press, 1990).

arise in responding to sexual violence complaints and be able to appropriately address these claims not only so that they can comply with their Title IX requirements, but so that they can protect their students from future sexual harassment and violence.¹³⁰

IV. THE POLICE OPTIONAL APPROACH

Recent news articles and the crackdown on Title IX violations by the Obama administration highlights the fact that rape and other forms of sexual violence on college campuses is a major problem.¹³¹ While the statistics on the amount of victims of sexual assault on college campuses is astounding,¹³² the amount of cases that are mishandled by university officials is even more staggering.¹³³ The reality is that while the amount of people who will become victims of sexual violence on college campuses is large,¹³⁴ a significant portion of victims will not actually make formal reports of their assaults.¹³⁵ It is the legal and moral responsibility of both universities and the Office of Civil Rights to change that.¹³⁶

One reasons often given by victims for failing to report the assault is that they feel that there will not be punishment for the defendant, and another prevalent reason is that victims feel that there are barriers to reporting.¹³⁷ This is largely due to the structural impediments that exist in sexual violence policies.¹³⁸ These impediments include policies, procedures, and protocols that are not victim friendly.¹³⁹ There are several scholars that believe that due to these structural impediments, along with the lack of judicial training by university officials, and the lack of ability to hand down severe punishment, that universities should not handle these claims at all, but that they should be handled by the criminal justice system.¹⁴⁰

130. See BARICKMAN, ET AL., *supra* note 130.

131. Claire Suddath, *The White House Cracks Down on College Sexual Assault as Tufts Refuses to Comply*, BLOOMBERG (Apr. 29, 2014), <http://www.bloomberg.com/bw/articles/2014-04-29/the-white-house-cracks-down-on-college-sexual-assault-as-tufts-refuses-to-comply>.

132. See Krebs et al., *supra* note 25, at 25.

133. See BOHMER & PARROT, *supra* note 81, at 37.

134. See Krebs et al., *supra* note 25, at 11.

135. SOKOLOW, *supra* note 34, at 5.

136. SOKOLOW, *supra* note 34, at 5.

137. Krebs et al., *supra* note 25, at 23.

138. SOKOLOW, *supra* note 34, at 6.

139. SOKOLOW, *supra* note 34, at 5 (listing universities that limit jurisdiction by imposing a short period of time between that incident and when the report must be made as an example of a major structural impediment).

140. DeBold, *supra* note 129, at 11 (stating that Title IX places a duty on colleges to respond to sexual violence that occurs on their campuses).

The current policy of the Office of Civil Rights is that universities do not have to report sexual violence to the police or investigate the sexual violence in accordance with local law enforcement.¹⁴¹ Rather, the Office of Civil Rights has allowed universities to handle the sexual violence claims independently,¹⁴² allowing them to adopt their own procedures and investigation, without any oversight from outside agencies.¹⁴³ Because the Office of Civil Rights does not require universities to report sexual violence to the police, the criminal justice system only gets implemented when sexual violence occurs on a college campus in limited circumstances.¹⁴⁴

This policy has been met with much resistance, and in fact, seven out of ten college students say that they have no faith in their university's process for handling claims of sexual violence, or confidence in those who administer it.¹⁴⁵ There are also university officials, scholars, and lawmakers who are opposed to allowing universities to have so much control over sexual violence claims.¹⁴⁶ It has also caused problems for local law enforcement that claim universities do not cooperate with them when there is a criminal complaint filed, and that there is a severe lack of information sharing.¹⁴⁷

This lack of cooperation by universities, and the fact that Office of Civil Rights allows this, almost gives the impression that Office of Civil Rights puts a university's discretion on how to handle these claims, over the importance of law enforcement investigations. Thus, universities need to be required to cooperate with police if there is a criminal investigation even if the university is conducting their own investigation. Additionally, since university investigation and adjudication of sexual violence claims are mandated by Title

141. DeBold, *supra* note 129, at 11.

142. DeBold, *supra* note 129, at 11.

143. DeBold, *supra* note 129, at 11. The OCR simply states that universities can carry on their own investigation simultaneously with any criminal investigation IF a criminal investigation is taking place, but there is not a requirement that there actually be a criminal investigation or that the university accommodate or work with those handling the criminal investigation. QUESTIONS AND ANSWERS, *supra* note 32, at 28.

144. DeBold, *supra* note 129, at 12–13 (stating that the criminal justice system is involved only if: 1. The university has a voluntary agreement with local law enforcement; 2. State law mandates it; or 3. A victim chooses to contact law enforcement at their own discretion).

145. SOKOLOW, *supra* note 34, at 6.

146. SOKOLOW, *supra* note 34, at 7–8 (stating that there are often three main reasons cited for the opposition: 1. There is nothing that mandates colleges to adjudicate complaints that are tantamount to felonies; 2. Criminal courts are better suited to here these types of complaints; and 3. University official lack the judicial training to handle these types of complaints).

147. DeBold, *supra* note 129, at 18. Due to the secrecy of most universities procedures in handling sexual violence claims police are left in the dark about some details of the assault and how the university is handling it. DeBold, *supra* note 129, at 18. Many law enforcement agencies claim that sexual violence has gotten worse on college campuses partially due to this lack of cooperation. DeBold, *supra* note 129, at 18.

IX there needs to be uniform procedures for how sexual violence claims are handled, but this still will not eliminate the entire problem.

College adjudication hearings are not criminal trials, and no one can be put in jail as a result of one of these hearings.¹⁴⁸ Therefore, universities should be required to report all claims of sexual violence to the local authorities and cooperate with them in their investigation. This is not to say that universities should not also conduct an investigation, but allowing them to be the only source of investigation for sexual violence claims is essentially decriminalizing rape and other forms of sexual violence.¹⁴⁹

While universities are required to investigate claims of sexual violence there has been no inquiry by the Office of Civil Rights into whether or not these universities have the capabilities to handle these types of investigation.¹⁵⁰ While some universities have better investigation procedures than others,¹⁵¹ there needs to be a system in place that checks to make sure that resources are available to all universities so that uniformity in the investigative process can be created in universities nationwide. While universities with a lack of resources could form agreements to work with local law enforcement on claims of sexual violence,¹⁵² most refuse to because they do not want to give up control over these types of complaints.¹⁵³ Accordingly, victims who attend these universities will suffer from poorly conducted investigations which, in turn makes it harder for them to press criminal charges or win a case in front of the university's disciplinary committee.¹⁵⁴

Another problem with not having mandatory reporting for universities is that sometimes the universities interest will conflict with that of the victim and will then lead universities to insufficiently investigate sexual violence. Danielle Debold, a legal scholar, perfectly articulates this concept, "as a practical matter, when a victim files a sexual assault complaint with her university, the investigation of her assault will be in the hands of a powerful institution that has its own priorities."¹⁵⁵ She goes on to say,

"Indeed it seems rational a college will be inclined to sweep cases under the rug when it fears the negative publicity will affect future enrollment, fundraising efforts, alumni support, and the overall reputation of the

148. DeBold, *supra* note 129, at 12 (stating that university hearings are somewhat of a hybrid of the civil and criminal law systems with civil proof standards being used but criminal investigation and constitutional standards).

149. DeBold, *supra* note 129, at 11–12.

150. DeBold, *supra* note 129, at 16.

151. See Karjane et al., *supra* note 13, at 125.

152. DeBold, *supra* note 129, at 17.

153. DeBold, *supra* note 129, at 17.

154. DeBold, *supra* note 129, at 17.

155. DeBold, *supra* note 129, at 17.

institution.”¹⁵⁶ This perception is possibly another reason why victims are so reluctant to report incidents of sexual violence to their universities.¹⁵⁷

One of the major conflicting interests has often been when the offender is a high profile sports player at the university.¹⁵⁸ Schools with division one sports teams bring in millions of dollars per year in revenue from television contracts, game tickets, and pre-season games¹⁵⁹, and this money often helps fund the school as a whole by assisting with scholarships, improvement of academic programs, and the building of new facilities.¹⁶⁰ This can be an incentive for university officials to look the other way or not handle a claim to the best of their ability when a major athlete at the school is accused of sexual violence.¹⁶¹ This also leads to the perception that a university will protect the student athlete more than other students.¹⁶² While victim’s can file Title IX suits if they feel that the school is not following proper protocol when a complaint is filed¹⁶³, they still must prove the extremely high burden of “deliberate indifference,” on the part of the university.¹⁶⁴ Additionally, the broad standards set by the Office of Civil Rights allow the university to essentially develop their own procedures for handling these claims¹⁶⁵, which also makes it harder for a victim to prove that the university purposefully didn’t investigate a claim because of a conflicting interest.

Therefore, the policy set forth by the Office of Civil Rights that allows universities to take the police optional approach, and does not make it mandatory to report sexual violence to local police,¹⁶⁶ needs to be eliminated. Those who commit rape and other forms of sexual violence are likely to be repeat offenders,¹⁶⁷ and a college hearing where the maximum punishment is

156. DeBold, *supra* note 129, at 18.

157. SOKOLOW, *supra* note 34, at 5.

158. See Christopher Parent, *Personal Fouls: How Sexual Assault by Football Players is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 617, 621 (2003).

159. Parent, *supra* note 159, at 621.

160. Parent, *supra* note 159, at 621.

161. See Parent, *supra* note 159, at 621.

162. Parent, *supra* note 159, at 621 (describing the case at the University of Colorado where a student was gang raped at the football team’s annual recruitment party and no disciplinary action was taken after she reported it). The student then filed a Title IX suit against the university stating that the university used “deliberate indifference” in handling her complaint). *Id.*, at 620.

163. See *Davis Next Friend Lashonda D. v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 642 (1999).

164. *Id.* at 642–43.

165. DeBold, *supra* note 129, at 11.

166. See QUESTIONS & ANSWERS, *supra* note 32, at 27.

167. See David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73, 78 (2002) (stating that sixty-three percent of all sexual violence offenders who are not prosecuted by criminal justice authorities will be repeat

suspension or expulsion, is not going to deter these offenders from committing crimes of sexual violence again.¹⁶⁸ The lack of uniformity in investigative procedures for sexual violence claims, the lack of resources by universities to properly investigate and adjudicate these claims, along with the potential for universities to “sweep claims under the rug” due to their own agendas are all important reasons why universities should be required to report all claims of sexual violence to local law enforcement agencies.

Hearing a complaint of sexual violence is a serious matter. These sexual violence offenses are often equivalent to felony level crimes in most states.¹⁶⁹ Yet, when someone is found to be responsible for committing one of these offenses they can escape criminal prosecution and only be sentenced to probation or expulsion from a university. These crimes are too grave for universities to investigate and adjudicate alone, and this is why the criminal justice system should also be simultaneously handling these claims.

V. CONCLUSION

Title IX has significantly expanded since its inception in 1972 due to the courts interpretation of the law, as well as through the Office of Civil Rights’ Title IX Guidebooks and Dear Colleague Letters. While some of these expansions, such as the creation of a private right of action, have had a positive affect, other expansions have only caused confusion and an inability to create uniform standards. While Title IX is likely one of the most important pieces of legislation that will ever affect the educational system, it has also caused many problems due to the ambiguous way it has been interpreted. There is a dire need for the Office of Civil Rights to give universities more consistent and detailed guidelines of how to comply with Title IX.

Sexual violence is out of control on college campuses and these institutions need strict procedures to follow to be able to appropriately respond to these types of claims. The Office of Civil Rights also needs to require universities to report all instances of sexual violence to the local law enforcement authorities to ensure that these complaints are being handled appropriately, and with the severity that they deserve. College is supposed to be one of the most memorable and liberating experiences of a person’s life, but the reality is that one in four women in college will become a rape victim before they graduate. This daunting statistic calls for universities to be given detailed guidelines and

offenders). By performing interviews with 1,882 men who had admitted to being an offender and inflicting some form of sexual violence on another person, the authors found that the repeat rapist averaged 5.8 rapes each. *Id.* at 73.

168. Lisak & Miller, *supra* note 168, at 78.

169. SOKOLOW, *supra* note 34, at 12.

stringent rules to comply with Title IX, as well as law enforcement assistance, to ensure that these sexual violence claims are handled appropriately.

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